UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published Monthly (Except July, August and September) by The Department of Law of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 58 OCTOBER NUMBER 1

SUBSCRIPTION PRICE, $3.00 PER ANNUM, SINGLE COPIES, 35 CENTS

NOTES

LIABILITY OF STATE OFFICER FOR CONTEMPT OF UNITED STATES COURT.

Contempt of Court has been defined as "a disobedience to the Court, or an opposing or a despising the authority, justice, or dignity thereof."[1] Criminal contempt is that which is directed against the majesty of the law itself, rather than a refusal to do something at the behest of the Court to benefit the opposing party. And since contempt is regarded as an offense against the Court, it is essential to the proper maintenance of its dignity and power that it have authority to punish any act tending to weaken or destroy its exercise of its lawful functions. Such power has long been regarded as inherent in the Court. Said

[1] Viner's Abridgment, Title; "Contempt, A."

Mr. Justice Field in a much cited case:[2] "The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of courts, and consequently to the due administration of justice."

In *United States* v. *Shipp, et al.,* 29 Supreme Court Reporter, 637, decided May 24, 1909, is disclosed a very interesting state of facts which the United States Supreme Court held amounted to contempt on the part of a sheriff to whom was given the custody of a Federal prisoner. It appeared that one Johnson, a negro, had been charged with the commission, near Chattanooga, Tenn., of a crime the shocking brutality of which incensed the people of that city. Their anger was somewhat appeased by the action of the authorities in securing the speedy trial and conviction of the accused, and his sentence to death. His attorneys, after consultation with other prominent members of the bar, decided that an appeal would be useless and would only have the effect of inciting the mob to lynch their client and, perhaps, to kill other prisoners in the attempt, and they so informed the negro, who, while denying his guilt, acquiesced in the conclusion reached by his counsel. The day fixed for the execution was March 20, 1906, and on March 3 he filed a petition for a writ of *habeas corpus* in the United States Circuit Court. This petition was denied on March 10, and ten days given for appeal, the Court ordering that in the meantime the prisoner be remanded to the custody of the sheriff, the defendant Shipp. On March 17, Mr. Justice Harlan, of the United States Supreme Court, allowed an appeal, and on March 19, a motion for formal allowance having been made, it was granted and an order issued staying all proceedings, of which order Shipp was formally notified. . That evening the sheriff withdrew the customary guard, leaving the night jailer there alone. A mob gathered, entered the jail after getting the keys from the jailer without resistance on his part, took out the negro and lynched him. In an interview, published about two months later, the sheriff stated that he did not anticipate trouble until the next day, the one fixed for the execution; that he had gone to the jail and had remonstrated with the mob; that he did not attempt to hurt any of them and would not have made such an attempt if he could; and that, in any event, he could have done no good, as he was overwhelmed by numbers. He then went on to say that the Supreme Court was to blame; that "the people would not submit to the delay, and he did not won-

[2] *Ex parte* Robinson, 19 Wall. (U. S.) 505.

der at it." The Attorney General of the United States caused an information to be filed against a number of those accused of participating in the lynching, but the decision of the Court is particularly interesting as regards Shipp.

In the opinion of the majority of the Court, delivered by Mr. Chief Justice Fuller, the above interview is given considerable weight as explaining the acts of the sheriff. It appeared that after Shipp arrived at the jail he was carried upstairs, but later released, and stood around near a corridor door where the mob was at work, with three or four unarmed men around him; he made no attempt to summon a posse, or to call on the Governor for the aid of the militia, which was drilling a few blocks from the jail. These facts justified the inference, said the Chief Justice, that "Shipp not only made the work of the mob easy, but in effect aided and abetted it."

A strong dissenting opinion, in which Mr. Justice White and Mr. Justice McKenna concurred, was rendered by Mr. Justice Peckham. He argued that the sheriff was justified in not expecting the mob until the next day; that when he did face the mob, it was not necessary that he should have stood by the prisoner at the peril of his own life. He considered the sheriff's statement that "he would not have hurt the mob if he could," in connection with his further statement that he was overwhelmed by numbers, and contended that, thus read, it should have a different interpretation from that given it by the majority of his associates.

Although the arguments supporting the dissent are by no means weak, it is respectfully submitted that the conclusion reached by the majority of the Court is correct. The question was one of fact alone, and was whether the sheriff's acts were such as might be done by a man of ordinary intelligence, making an honest mistake in the performance of his duty, or were such as no intelligent man would commit without realizing the probability of the result which actually happened. In view of the fact that the self-restraint of the mob was due only to their belief that the execution would be carried out, it seems an insult to the defendant's intelligence to hold that he made an honest mistake in thinking that the mob, knowing that the execution was stayed indefinitely, would not act when it did.

Harsh though it may seem to hold the sheriff to the measure of responsibility indicated by the Court, yet, in the words of the Chief Justice, "if the life of anyone in the custody of the law is at the mercy of a mob, the administration of justice becomes a mockery;" and the preservation of the majesty of the law is of more importance than allowing the wide latitude of judgment

contended for in this case, and thereby setting a dangerous precedent. The decision is a forcible enunciation from the highest Court of the land, speaking through its head, that, in order to be free of contempt of the Supreme Court of the United States, not only must an officer in charge of a Federal prisoner do nothing actively in interfering with such prisoner, but he must take all reasonable and necessary precautions to prevent interference by others.

Federal Jurisdiction Over a State Conducting a Private Business.

The jurisdiction of the Federal Courts, in suits against a State, is amply controlled by principles and decisions. The difficulty lies in the interpretation of the facts and their proper classification under the principles which govern.

In *Murray* v. *Wilson Distilling Co.*, the Circuit Court [1] erred in its interpretation and classification of the facts. Thereafter the Supreme Court of South Carolina,[2] in a well-reasoned opinion, properly interpreted the facts and the Supreme Court of the United States [3] sustained their interpretation and applied the established principles of law.

The State, under its police power, had engaged in the liquor business and later, upon closing out the business, made the defendant a commission to settle accounts. The plaintiff, a creditor for liquor sold to the State Dispensary, sought to collect by suit the amount due, but the defendant pleaded that the State was the real party in interest and had not consented to the suit.

There was here no question of any unconstitutional statute, but the defendant was acting as the lawful agent of the State in a lawful transaction. The plaintiff's relation was one arising purely out of contract—a mere creditor and debtor relation. The contract had been with the State and the mere appointment of the Commissioner to adjudicate and settle claims did not change the relation but left the State the real party to be affected by the decision.

Where the State is the real party in interest and is acting in its sovereign capacity in a field unrestricted by the higher sovereignty of the United States Constitution, proceedings cannot be

---

[1] 164 Fed. 1 (1908).

[2] 79 S. C. 316 (1908).

[3] 29 Sup. C. R. 458, 213 U. S.